No. 17-494

In The Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Dakota

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Far from "find[ing] an appropriate case" for this Court to reconsider the continuing vitality of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), *see Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring), the State of South Dakota has manufactured an entirely inappropriate vehicle for doing so. Through its "fast track" appeal, the State seeks to enlist the United States Supreme Court to provide what amounts to an advisory opinion on a barren factual record, contrary to this Court's proper constitutional role and its carefully-circumscribed jurisdiction. In the process, the State runs roughshod over principles of *stare decisis*, disregards significant concerns of retroactive liability, and fails to establish facts sufficient for this Court to evaluate the complex and delicate balance between the burdens of imposing nationwide sales and use tax obligations on interstate businesses, on the one hand, and the States' interest in requiring companies located beyond their borders to serve as the States' use tax collectors, on the other. South Dakota thus invites the Court to assume a legislative role, supplanting Congress, the body to which the Constitution assigns responsibility for regulating commerce "among the several States," and which is actively addressing the issue. U.S. Const., art. I, § 8, cl. 3.

The question presented is:

> Whether the State's petition presents an appropriate case for this Court to reexamine *Quill*?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents Wayfair Inc., Overstock.com, Inc., and Newegg Inc. each states that:

1. It has no parent corporation.

2. No publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

What the State asks the Court to do is extraordinary. It urges this Court to intervene in a complex policy matter, which Congress is actively addressing. *See generally* Brief of Amicus Curiae Robert W. Goodlatte, Chair of the House Committee on the Judiciary, et al., in Opposition to the Petition ("Goodlatte Brief"). It demands that the Court overrule long-standing precedent on which thousands of companies continue to rely. It proposes that the Court expose those businesses to potentially bankrupting back-tax liability. All of this, the State requests in the absence of any record evidence; instead, it asks the Court to assume as fact non-record information that is out-of-date, disputed, and incomplete.

While it is clear that the retail marketplace has changed considerably since the Court decided *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), actual, not speculative, facts regarding how those changes have affected remote sales tax collection are required to evaluate the issue. Petitioner argues that software developments make tax collection easier for remote sellers. The truth is that sales tax collection has become more complex as the number of tax jurisdictions has more than doubled since 1992. Moreover, the integration of tax collection software is extraordinarily expensive. The State asserts that states are suffering an ever-increasing loss of tax revenue. The "problem" of uncollected taxes, however, has proven to be largely self-correcting, as the largest online sellers collect sales tax in all states. Amazon.com, the poster-child of

online marketing, which accounts for half of all Internet sales and 60 percent of the growth, now collects sales tax in every state that has a sales tax.

If *Quill* is overruled, the burdens will fall primarily on small and medium-size companies whose access to a national market will be stifled. Congress can address this issue in a balanced and comprehensive manner through legislation. This Court should not accept the petitioner's invitation to abandon precedent on a barren factual record.

The Constitution assigns to Congress the responsibility of regulating interstate commerce. U.S. Const., art. I, § 8, cl. 3. In the area of state taxes, Congress has exercised its authority on a number of occasions, including with regard to transactional taxes and taxes targeting electronic commerce.[1] At present Congress is working "diligently and assiduously" on remote sales tax legislation in order to "resolve the myriad of issues that create the burden on interstate commerce through crafting compromises and drafting rules that simplify procedures and minimize complexities" of multi-state compliance. Goodlatte Brief at 2, 21.

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[1] *See, e.g.*, Interstate Income Act of 1959, P.L. 86-272, 15 U.S.C. §§ 381-384. (limiting state taxes on net income); Intermodal Surface Transportation Efficiency Act, P.L. 102-404, 49 U.S.C. § 31705 (1991) (requiring conformity to International Fuel Tax Agreement for state fuel use taxes); Internet Tax Freedom Act, 47 U.S.C. § 151 note (originally enacted in 1998; made permanent in 2016, P.L. 114-125, Sec. 922(a)) (2016) (prohibiting discriminatory state taxes on electronic commerce).

It is well-understood that the negative implication of the Commerce Clause's affirmative grant of authority to Congress is a corresponding limitation on the power of the States. This limitation on state authority to impose tax and regulatory obligations on interstate businesses has been recognized in "dozens of [this Court's] opinions, joined by dozens of Justices." *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787, 1806 (2015) (brackets added).

With regard to sales and use taxes, the constitutional restriction on a state's authority to require collection of such taxes by a company that lacks a physical presence in the state is long-standing. When, in 1967, the Court expressly recognized the "sharp distinction" between retailers with "outlets, solicitors, or property within a State" and "those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," the Court relied upon cases from earlier decades. *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753, 758 (1967) (citing *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941) and *Miller Bros. v. Maryland*, 347 U.S. 340 (1954)).

In 1992, *after* the Court's seminal state tax decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and under the auspices of *Complete Auto*'s "substantial nexus" test, *Quill* reaffirmed the "physical presence" rule for sales and use taxes. *Quill*, 504 U.S. at 313-18. It was by then well-established that the substantial nexus requirement applies not only with respect to cross-border transactions potentially subject

to state tax reporting, but also to an interstate business itself. *E.g.*, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (an "interstate business must have a substantial nexus with the State before *any* tax may be levied on it") (italics in original).

The State's petition presents the question of whether the *Quill* physical presence standard should be overruled. This oddly-manufactured appeal by the State, however, could hardly be less suitable for an adequate review of *Quill*. The petition's shortcomings are numerous. In "fast tracking" its suit for potential review, the State presented no evidence, at all, in the lower courts. Any reference to "the record" in the petition (*see, e.g.*, Pet. at 3, 30) is necessarily to disputed, extra-record, secondary-source material, all of which is refuted by other, extra-record sources that demonstrate, in contradiction to the State's dire predictions, a strong trend toward *increased* use tax collection on Internet transactions. Moreover, the State's petition mischaracterizes the efforts of Congress to address use tax collection on remote sales and urges what amounts to legislative action by the Court. It grossly underestimates the continuing strength of *stare decisis* in this area. The State glosses over serious questions of potential retroactive tax liability for remote sellers that have relied upon the physical presence standard. It fails to explain that the States increasingly have regulatory tools at their disposal to improve use tax compliance by in-state consumers. It mischaracterizes litigation in other states and downplays pending challenges that focus on actual conditions in the electronic marketplace

and could serve, in contrast with the State's fact-free appeal, to bring the application of the *Quill* rule to the Internet economy into sharper relief.

Rather than presenting a narrow legal issue for the Court's review, the State's petition is freighted with complex questions unsuitable for review on this record. The proper course is to permit Congress to complete its work. Intervention by the Court into that process would only thwart the prospects for a lasting legislative solution. Goodlatte Brief at 24-25.

JURISDICTION

The judicial power of the United States is limited to the adjudication of "Cases" and "Controversies." U.S. Const., art. III, § 2. "[N]o justiciable 'controversy' exists" when a party seeks an advisory opinion. *United States v. Asakevich*, 810 F.3d 418, 420 (6th Cir. 2016) (citing *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007)). The case-or-controversy requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S 472, 477 (1990).

The State seeks the abrogation of the *Quill* physical presence rule, which is designed to prevent undue burdens on interstate commerce. *Quill*, 504 U.S. at 313-14 and n.6. In the state courts below, the State presented no evidence regarding any issue bearing on whether approval of South Dakota's sales tax collection requirements would burden interstate

commerce. Instead, the State conceded summary judgment and rushed an appeal to this Court. As a result, there is no factual record on which the Court may evaluate the constitutional issue the State seeks to present and no justiciable controversy under Article III.

STATEMENT OF THE CASE

The State attributes this appeal to the "machinery of South Dakota's government," Pet. at 37, but credit for its effort must be shared. In January 2016, the National Conference of State Legislatures ("NCSL") Task Force on State and Local Taxation received advice from a Supreme Court practitioner (now Counsel of Record for petitioner) detailing the elements of a bill designed to promote a *Quill* challenge. Jennifer DePaul, *Task Force Promises Legislation Designed to Overturn* Quill, 79 State Tax Notes 185-86 (Jan. 18, 2016). The normal features of an appropriate tax proceeding could be jettisoned, counsel suggested. "You can say, look, usually we have an audit, usually we have a state tax court, usually we have an appeal to a state supreme court. But if you are passing a bill, you don't have to have any of that." *Id.* at 186.

South Dakota responded to the call in March 2016. Treating Justice Kennedy's concurring comments in *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124 (2015) ("*Brohl I*") as an "invitation" to action, *not by the legal system* in its ordinary workings, but for the adoption of an unprecedented manipulation of the court system,

the State enacted "An act to provide for the collection of sales taxes from certain remote sellers" (the "Act"), now codified at SDCL chapter 10-64.

The Act requires any seller that "does not have a physical presence in the state" to collect and remit sales tax if, during the previous or current calendar year:

> (1) the seller's gross revenue from the sales of tangible personal property, any products transferred electronically, or services delivered into South Dakota exceeds $100,000; or
>
> (2) the seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in 200 or more separate transactions.

SDCL § 10-64-2. In devising these standards, however, the legislature expressly found that: (a) existing constitutional doctrine "prevents states from requiring remote sellers to collect sales tax;" and (b) "a decision from the Supreme Court of the United States abrogating its existing doctrine" would be necessary for the Act to be enforced. *Id.* § 10-64-1(7), (10).

Relying upon a right of action afforded under the Act only to the State itself, *id.* § 10-64-3, the State filed suit in April 2016 against the respondents, hand-picked retailers with no physical presence in South Dakota that the State conceded were acting lawfully in not collecting sales tax. *See id.* § 10-64-1(10); Complaint ¶ 24. The State sought a declaration that the Act is valid as applied to the respondents, although the

State acknowledged that the Act's collection requirements are unconstitutional. Complaint ¶¶ 1, 51.

In their Joint Answer, the respondents admitted that each of them: (a) lacks a physical presence in South Dakota; (b) had gross revenue in 2015 from the sale of tangible personal property delivered into South Dakota in excess of $100,000 and/or sold tangible personal property for delivery into South Dakota in 200 or more transactions; and (c) is not registered to collect South Dakota sales tax. No other facts are established by the proceedings below. *See* Addenda A & B (Statement of Undisputed Material Facts and the State's response). Since the undisputed facts established that the respondents had no physical presence in the state, they moved for summary judgment.

The State accepted that the statutory thresholds were satisfied and offered *no evidence regarding any other matter*. *See* Addendum B. Although it intended to challenge the continuing vitality of *Quill* – an established precedent designed to prevent undue burdens on interstate commerce – the State proffered no evidence regarding the respondents, no evidence regarding sales or marketing via the Internet, no evidence regarding the mechanics of state tax collection, no evidence about advances in technology, and no evidence regarding the nationwide sales and use tax system. The State conceded that because *Quill* is controlling, the lower court was required to grant the respondents summary judgment.

In March 2017, the circuit court awarded judgment (Pet. App. B) and the State appealed. In its brief to the South Dakota Supreme Court, the State urged the Court to affirm summary judgment against the State.

On September 13, 2017, the South Dakota Supreme Court affirmed the entry of judgment for the respondents. Pet. App. A.

REASONS FOR DENYING THE PETITION

I. Congress Is The Proper Institution To Address This Complex Issue.

Striking the proper balance between a free-flowing national marketplace, on the one hand, and the interest of the States in burdening such commerce in order to secure the collection of taxes due from their residents, on the other hand, is a responsibility assigned by the Constitution to Congress and not to the States, let alone an individual State. U.S. Const., art. I, § 8, cl. 3. "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." *Bellas Hess*, 386 U.S. at 760.

In light of Congress' role in regulating interstate commerce, "the better part of both wisdom and valor is to respect the judgment of the other branches of the

Government." *Quill*, 504 U.S. at 318-19. It is only Congress, and not the States or the Courts, that has the institutional expertise to weigh the national implications of expanded state taxing authority and craft legislation to ensure that state tax obligations do not unduly burden interstate commerce.

To that end, Congress is considering bills that would determine the conditions under which states would be authorized to require retailers with no physical presence in a state to collect and remit sales and use taxes. Pending before Congress are three bills: (1) Marketplace Fairness Act of 2017, S. 976, 115th Cong. (2017-2018), a version of which passed the Senate in 2013; (2) Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong. (2017-2018); and (3) No Regulation Without Representation Act, H.R. 2887, 115th Cong. (2017-2018).

In addition, the House Judiciary Committee, the committee with jurisdiction over proposals for increased state taxing authority over interstate commerce, has worked tirelessly in pursuit of a compromise bill that will address the many competing concerns and balance the diverse interests with regard to this complex issue. *See* Statement of Chairman Robert W. Goodlatte (Dec. 4, 2017) ("Goodlatte Statement") (describing the "thousands of hours" invested in developing the Committee's "compromise solution"), https://goodlatte.house.gov/UploadedFiles/Efforts_to_Resolve_the_Remote_Sales_Tax_Issue.pdf. The Judiciary Committee has worked through multiple versions of legislation, each bringing

"the interested parties closer together." Goodlatte Brief at 17.

The State bemoans congressional inaction (Pet. at 28), but it mischaracterizes the efforts of Congress. Congress has considered numerous legislative proposals since *Quill* was decided, with particular intensity over the past five years. *See generally* Goodlatte Statement. Even the amicus brief filed by the Senators urging this Court's review demonstrates Congressional focus on the issue. *See* Addendum to Brief of Amicus Curiae of Four United States Senators and Two United States Representatives In Support of Petition ("Senators' Brief") (detailing bills and hearings concerning remote sales tax collection). Moreover, the inability of Congress, so far, to reach consensus is attributable, in no small part, to the refusal of sales tax states and localities to accept any simplification measures not devised by the states themselves.[2] The pursuit of this litigation by South Dakota has effectively halted compromise negotiations and created a further obstacle to Congress achieving a result that would promote the interests of all sides to the debate

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[2] The State decries *Quill* because it claims the Court's ruling upholding the physical presence test requires the State to "beg" Congress for the authority to exercise its sovereign taxing powers. Pet. at 4, 28. *Quill*, however, no more "seizes a power from the States" (Pet. at 28) than *Complete Auto* does. Both cases properly recognize that state tax authority is subject to the *constitutional* limitations imposed by the Commerce Clause, specifically, the requirement that state tax laws not unduly burden interstate commerce. *See Quill*, 504 U.S. at 311, 314 (*Quill* is consistent with *Complete Auto* and "furthers the ends of the dormant Commerce Clause"). Congress has the authority to adjust such limitations.

and bring certainty to States and interstate businesses alike. Goodlatte Brief at 24-25.

A decision by the Court to grant the State's petition – particularly where the factual record is devoid of information concerning the many complexities that Congress is working to address – would damage prospects for a legislative solution. *Id.* Since Congress is fulfilling its institutional role, while the Court has neither the tools nor the information to take its place, "the better part of both wisdom and valor" is to respect the judgment of Congress and deny the petition. *Quill*, 504 U.S. at 318-19 (internal citation omitted).

II. The State's Challenge To *Quill* Is Non-Justiciable.

A. The Court Lacks The Power To Offer Opinions On Assumed Or Speculative Facts.

The judicial power of federal courts is limited by Article III to "Cases" and "Controversies." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016); art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation on federal-court jurisdiction to actual cases or controversies." *Spokeo*, 136 S.Ct. at 1547 (internal quotation omitted). An actual controversy must be "extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (internal quotation and citations omitted). The State, as the party invoking

federal jurisdiction, bears the burden of establishing it. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The facts supporting jurisdiction must "appea[r] affirmatively from the record." *Id.* (citing *King Bridge Co. v. Otoe Cnty.*, 120 U.S. 225, 226 (1887) (brackets in original)).

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). Where a plaintiff fails to develop a record to support a fact-intensive constitutional claim, its request for a declaratory judgment becomes non-justiciable. *Travelers Ins. Co. v. Obusek*, 72 F.3d 1148, 1155 (3d Cir. 1995) ("Without the necessary facts, the Court is left to render an advisory opinion.").

B. There Is No Factual Record Concerning The *Quill* Issue.

The State filed suit seeking a declaration that it could "require the Defendants to collect and remit state sales tax" and acknowledging that such a declaration would "require the abrogation of *Quill*." Complaint ¶¶ 1, 51. Whether or not the action reflected a potentially justiciable controversy at the time it was filed,[3] the manner in which the State prosecuted the

[3] The structure of the Act suggests that the State intended from the outset to secure an advisory opinion concerning *Quill*. The Act contains provisions suspending its enforcement and preventing the State from pursuing liability for a company's failure to register and collect the tax. *Id.* §§ 10-64-4, -6, -7. The Act creates

action, without record evidence, has rendered it non-justiciable by this Court.[4]

The State's fundamental premise for why *Quill* should be revisited is that circumstances in the retail marketplace have dramatically changed since *Quill* was decided. Pet. at 3 ("[A]fter 25 years of technological progress and economic changes, [the physical presence test] has proven entirely out of date.") (brackets added). The State, however, presented no facts in the proceedings below. Instead, accepting that *Quill* controlled the outcome, the State conceded summary judgment in order to press this appeal.[5] As a result, there is no record on which this Court can evaluate the continuing vitality of the *Quill* standard.

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an exclusive right of action in the State, and instructs the state courts that dismissal or summary judgment is appropriate, given the Act's dubious legality. *Id.* § 10-64-3. Thus, the Act remains ineffective until this Court advises the parties that *Quill* is no longer controlling.

[4] The South Dakota Supreme Court's jurisdiction is not similarly limited to "Cases" and "Controversies," but is determined "as may be provided by the Legislature." S.D. Const., art. V, § 5.

[5] As Justice Thomas noted in *Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017), where a plaintiff consents to the entry of judgment against it on the merits, the necessary adversity may be destroyed. *Id.* at 1717 (Thomas, J., concurring). "[I]t has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it." *Id.* (citations omitted).

C. The Dormant Commerce Clause Necessitates A Fact-Intensive Review.

The rule of *Bellas Hess* and *Quill* is based upon a fundamental premise that is factual, not legal: namely, that compliance with the use tax collection, remittance, and reporting obligations of thousands of state and local taxing jurisdictions where a company has no physical presence imposes undue burdens on interstate commerce. *Quill*, 504 U.S. at 313-19.

The State bears the obligation to demonstrate that this underlying premise is incorrect. The State, however, has offered no evidence to support overruling *Quill*. Instead, the petition simply assumes that the burdens of nationwide use tax reporting are negligible. The State then proclaims that interstate sellers are afforded an unfair advantage because they are not required to collect and remit use taxes in jurisdictions where they have no physical presence. Pet. at 4. But employing circular logic does not prove the underlying condition as a factual matter.

The record omissions are glaring. The State presented no record evidence before the state circuit court regarding the "technological progress" and "economic changes" it asserts have rendered *Quill* obsolete. Pet. at 3. It proffered no evidence regarding the advances in computing that the State claims have "made it easy" for retailers to comply with state sales and use tax laws. *Id.* Notably, the continued expansion of state sales taxing jurisdictions from over 6,000 in 1992 to more than 16,000 today belies any such "ease."

Compare Quill, 504 U.S. at 313 n.6 (6,000 taxing jurisdictions) *with* Avalara, *Getting started with Avalara* (addressing requirements of "16,000+ jurisdictions"), https://offers.avalara.com/avalara-brand/ (last visited Dec. 4, 2017). The State offered no evidence to show that the dramatic increase in the number of taxing jurisdictions has not similarly increased the burdens of multi-jurisdictional use tax compliance.

Oddly, the State treats the absence of record facts as a virtue of its petition. Pet. at 2, 36 (touting the State's appeal as a "uniquely clean and timely vehicle"). This Court, however, has emphasized the need for a factual record in dormant Commerce Clause cases. When "state legislation comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,'" the Court is "confronted with the task of effecting an accommodation of the competing national and local interests." *Wash. State Apple Adver. Comm'n v. Hunt*, 432 U.S. 333, 350 (1977). This constitutional inquiry involves "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978).

In cases examining whether state laws place an undue burden on interstate commerce, a detailed factual record is essential, not exceptional. So, for example, the record underlying the Court's decision in *Hunt* included factual findings by the district court regarding the national marketplace, the regulated entities in question, and other states' business practices and

regulations. *See Wash. State Apple Adver. Comm'n v. Holshouser*, 408 F.Supp. 857, 858-59 (E.D.N.C. 1976) (factual findings). *Quill* itself, while resulting from a declaratory judgment action filed by the state, was presented to the Court on a detailed record. 504 U.S. at 302-04 and n.1. Similarly, in *Raymond Motor Transp.*, the Court reviewed a wealth of record evidence concerning the "substantial burden on the interstate movement of goods" resulting from the state's regulation and concluded, based on "the record in this case that the challenged regulations unconstitutionally burden interstate commerce." 434 U.S. at 444-45.

D. This Court's Role As An Appellate Tribunal Requires Factfinding In The Lower Court.

By foregoing all factual development and requesting that the state circuit court and supreme court rule against it, the State has effectively placed its appeal in the same posture as a suit brought by a state under the Court's original jurisdiction.

The Court has determined that suits brought to it directly by states against the citizens of other states are ill-suited for the Court's review. *See, e.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497-99 (1971). A principal reason for the Court's decision to decline jurisdiction in such cases is that the Court is "structured to perform as an appellate tribunal, illequipped for the task of factfinding." *Id.* at 498. Even with regard to "important questions of vital national importance,"

Washington v. Gen. Motors Corp., 406 U.S. 109, 112 (1972), the Court carefully guards its jurisdiction against disputes in need of factual development for review in an appellate posture. *Wyandotte Chems.*, 401 U.S. at 498-99 (this Court is an "inappropriate forum" for addressing cases that have enjoyed no development in the lower courts). In bypassing any such development below, the State has rendered its claim non-justiciable in this Court.[6]

III. Principles Of *Stare Decisis* Strongly Weigh Against Granting The Petition.

The doctrine of *stare decisis* is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2409 (2015) (quoting *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2036 (2014)). A party arguing that precedent should be overruled must show that there is "special justification" for abrogating the decision. *Kimble*, 135 S.Ct. at 2409 (citation omitted). Where precedent concerns a substantive rule of law that dictates how companies order their affairs, considerations of *stare decisis* are "at their acme." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

Furthermore, as Justice Scalia noted in *Quill*, *stare decisis* applies with enhanced force with respect

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[6] The ordinary procedure for developing a record in a tax case is to pursue an assessment and appeal process. This is the standard means by which the State, and every other state that has sales and use taxes, pursues tax administration and enforcement. *See generally* SDCL ch. 10-59.

to the Court's dormant Commerce Clause decisions, because Congress "remains free to alter what we have done." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Just as when a decision of the Court interprets a federal statute, "critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble*, 135 S.Ct. at 2409 (citing *Patterson*, 491 U.S. at 172-73).

Congress has demonstrated both the willingness and ability to adopt standards governing state taxation of interstate commerce, including as recently as 2016 with respect to Internet sales. *Supra* n.1. The physical presence standard has governed the application of state sales and use taxes to remote sales transactions for more than fifty years, during which time Congress has had multiple opportunities to alter it. *See* Addendum to Senators' Brief. Such "long congressional acquiescence" to the standard further amplifies the effect of *stare decisis*. *Kimble*, 135 S.Ct. at 2409-10 (citation omitted). Indeed, it would be illogical to conclude that because Congress has repeatedly *declined* to adopt a change to the *Quill* physical presence rule, this Court should overrule it.

Congress is also better suited to address the remote sales tax issue. Far more than the Court, Congress has "the capacity to assess" whether the physical presence rule retains its vitality today and, if not, the "prerogative to determine the exact right response – choosing the policy fix, among many conceivable ones, that will optimally serve the public interest." *Id.* at

2414. The Court has noted that, in such a circumstance, a "superspecial justification" would be required for the Court to overturn established precedent. *Id.* at 2410.

None of the reasons the Court has identified as grounds for overruling its prior decisions is present here.

A. Retailers Have Continued To Rely On *Quill*.

There can be no doubt that remote sellers employing a wide range of direct marketing methods (catalog/mail order, television/infomercial, telemarketing, Internet) have continued to rely upon *Quill*. *See generally* Brief of *Amicus Curiae* American Catalog Mailers Association in Opposition to Petition; Brief of NetChoice as *Amicus Curiae* in Support of Respondent. Perhaps most importantly, the physical presence rule has permitted start-ups and small businesses access to the Internet as a means to grow their companies, without exposing them to the daunting complexity and expense of nationwide sales tax collection. *See id.*

The State and its amici do not dispute the continued reliance by remote sellers. To the contrary, they complain that such reliance is unfair to companies that have a physical presence and must collect the sales tax. Pet. at 15-16. They further argue that reliance on the physical presence rule is not "legitimate," Pet. at 24, but as Justice Scalia recognized, it would be fundamentally incompatible with *stare decisis* to "demand

that private parties anticipate" the overruling of precedent and to "visit economic hardship upon those who took us at our word." *Quill*, 504 U.S. at 320 (Scalia, J., concurring) ("reliance upon a square, unabandoned holding of the Supreme Court is *always* justifiable reliance") (italics in original).

B. *Quill* Has Not Been Undermined By Later Decisions.

Quill's doctrinal underpinnings have not eroded over time. No post-*Quill* decision of this Court has undermined its holding, and the State points to none. *See* Pet. at 33-35.

To the contrary, the Court has in recent years favorably referenced the physical presence standard for use taxes in rejecting a locality's effort to use a federal statute to circumvent the *Quill* rule. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 17 (2010) (city improperly sought to impose civil liability on remote seller under RICO for uncollected use taxes that the company "had no obligation to collect, remit, or pay"); *id.* at 18 (Ginsburg, J., concurring) (noting that the Commerce Clause prohibits the imposition of a use tax collection obligation on an out-of-state seller with no physical presence in the jurisdiction, citing *Quill* and *Bellas Hess*). In addition, the Court has on more than one occasion cited with approval *Quill*'s ruling that the Commerce Clause establishes limitations on state taxing power that differ from the basic requirements of due process. *Mead-Westvaco Corp. v. Ill. Dep't of Revenue*,

553 U.S. 16, 24 (2008); *Wynne*, 135 S.Ct. at 1798-99. Even Justice Kennedy's concurrence in *Brohl I* cites no subsequent decision, of any court, that undercuts *Quill*'s holding with regard to sales and use taxes. *Brohl I*, 135 S.Ct. at 1134-35.[7]

The State and its amici instead argue that *Quill* is inconsistent with the Court's *pre-Quill* jurisprudence, in particular the Court's decision in *Complete Auto*. Pet. at 22-25. All of those arguments were addressed, and rejected, by the Court in *Quill*. 504 U.S. at 313-18.

C. *Quill* Was Not Badly Reasoned.

The Court adopted the physical presence standard in *Bellas Hess* by a 6-3 majority, and reaffirmed it by an 8-1 majority in *Quill*. Although each decision drew a dissenting opinion, the logic of the decisions is sound. The *Quill* rule is not based on "shaky economic reasoning." *Kimble*, 135 S.Ct. at 2412. The *Quill* Court fully understood the argument that protecting remote sellers from state use tax obligations in states where they have no physical presence purportedly gives them a price advantage over in-state retailers. 504 U.S. at 304 n.2 (referencing the lower court's conclusion that *Quill* affords a competitive advantage to out-of-state businesses). The question was whether the burdens of nationwide use tax collection would, in counterpoise, unduly burden such sellers and hinder interstate commerce. The Court concluded that they would. Indeed, it

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[7] No other Justice joined the concurrence, although the decision in *Brohl I* was unanimous. *Id.*

is *illogical* to argue that this Court would prescribe a constitutional standard serving no beneficial objective in order to tilt the competitive playing field.

Notably, lower courts have not questioned the validity of the *Quill* rule for sales and use taxes, but rather have declined to apply it to other types of tax, such as state income taxes. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank v. Comm'r of Revenue*, 899 N.E.2d 76 (Mass.), *cert. denied*, 557 U.S. 919 (2009). These decisions are almost universally premised on the conclusion that sales and use taxes impose substantially greater burdens on out-of-state companies than do income taxes. *KFC Corp.*, 792 N.W.2d at 325 ("the burden of state income taxation, however, is substantially less" than the burden of collecting and remitting sales tax); *Capital One*, 899 N.E.2d at 85 ("the collection of franchise and income taxes did not appear to cause similar compliance burdens"); *Tax Comm'r v. MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 233-34 (W.Va. 2006) (the burden of sales tax collection is greater than franchise/income taxes and "demands knowledge of a multitude of administrative regulations"), *cert. denied sub nom. FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007).

D. The Physical Presence Standard Is Not "Unworkable."

The *Bellas Hess/Quill* rule is not difficult to apply. If a company is physically present in a state, directly

or through third-parties acting on its behalf to make a market for sales in the state, then the company may be required to collect and remit the state's sales and use taxes. *See, e.g., Standard Pressed Steel Co. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-63 (1975) (single employee in the state creates nexus); *Tyler Pipe Indus., Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232, 250 (1987) (third-party sales representative engaged in substantial activities in the state establishes nexus for out-of-state company). If neither the company nor a third party acting for it is physically present in the state, then the State may not compel an out-of-state entity to collect use tax. *Quill*, 504 U.S. at 314-18.

This is not to say that the rule forecloses all litigation regarding its reach. Lower courts have, for example, differed over the question of when a demonstrable, but minimal, physical presence is sufficient to create nexus. *E.g., In re Appeal of Intercard*, 14 P.3d 1111, 1122-23 (Kan. 2000) (sporadic employee visits over four years insufficient for nexus); *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 813-14 (Haw. 2004) (annual three-day customer visits creates nexus). But the recognition of a *de minimis* standard has always been an acknowledged caveat to the "bright line," physical presence test and does not make it "unworkable" in any sense. *Quill*, 504 U.S. at 315 n.8; *see also Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992) (state authority to require payment of net income tax by remote sellers is subject to a *de minimis* standard).

E. Changed Circumstances Do Not Warrant Overturning *Quill*.

While it is evident that the development of the Internet has resulted in dramatic changes in the retail marketplace since 1992, it remains to be determined what those changes mean with regard to remote sales tax collection. Rapid evolution of the retail market has been accompanied by ever-increasing complexity in state sales and use tax systems.

Rather than presenting evidence to support its claim that the *Quill* rule is outdated, the State relies on non-record materials – most of which are themselves disputed, stale, and erroneous – concerning the changed circumstances it contends warrant a reconsideration of *Quill*. *See generally* Pet. at 12-19. These claims are readily debunked.

1. Multistate Sales Tax Collection Remains Burdensome.

The system of state and local sales taxes in the United States is highly complex. There are 45 states, plus the District of Columbia, that have a sales tax, and thousands of local taxing jurisdictions. This dizzying array of jurisdictions results in thousands of different tax rates, taxable and exempt products and services, exempt purchasers, shipping tax treatment, specialized tax rules (such as sales tax "holidays" and "thresholds" for different products), statutory definitions, registration and reporting regimes, record

keeping requirements, and filing systems.[8] In addition to compliance burdens, companies are exposed to potential audit by every state and locality with a self-administered sales or use tax. Remote sellers are only shielded from such inordinate burdens by *Quill*.

The number of taxing jurisdictions has continued to mushroom. *See* Billy Hamilton, *Home Sweet Taxing Unit*, 56 State Tax Notes 217, 220 (Apr. 19, 2010) ("on average, a new local government is created every day in the United States"). The Court noted in *Bellas Hess* that there were 2,300 such jurisdictions. 386 U.S. at 759 n.12. In 1992, there were over 6,000. *Quill*, 504 U.S. at 313 n.6. Today, the companies that provide tax compliance software variously estimate the number of total taxing jurisdictions at between 10,000 and 16,000. Vertex, *Solutions* (more than 10,000), https://www.vertexinc.com/solutions/indirect-tax-solutions/sales-tax; OneSource, *Sales & Use Tax Solutions* (over 14,000), https://tax.thomsonreuters.com/products/brands/onesource/indirect-tax/sales-use-tax/; Avalara, *Getting started with Avalara* ("16,000+ jurisdictions"), https://offers.avalara.com/avalara-brand/. The number and types of local tax jurisdictions is staggering, including not only

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[8] The State blithely asserts that "these companies surely can calculate sales tax from a zip code," Pet. at 3, but the State fails to acknowledge that local sales tax jurisdictions are *not* co-extensive with postal codes. *See* Client's First Business Solutions, *Avoid the Perils of Zip Code-based Sales Tax Management* ("what ZIP codes *don't* do is accurately indicate sales tax rates") (italics in original), http://www.clientsfirst-us.com/blog/sage/sage-mas-90-200-mas90-mas200/avoid-the-perils-of-zip-code-based-sales-tax-management/.

cities and counties, but also parishes, stadium districts, transportation districts, water districts, scientific and cultural facilities districts, and police jurisdictions, among others. *See* Hamilton, 56 State Tax Notes at 220.[9]

The State asserts that retailers can "easily" implement nationwide sales tax collection due to improvements in software, but the State misrepresents the complexity. Integrating tax software with multiple systems, including a company's ecommerce, enterprise management, and financial reporting systems, and maintaining it over time, imposes considerable initial and ongoing expense. Larry Kavanagh and Al Bessin, *The Real World Challenges in Collecting Multi-State Sales Tax For Mid-Market Online and Catalog Retailers*, TruST (Sept. 2013), http://truesimplification.org/wp-content/uploads/Final_Embargoed-TruST-COI-Paper-.pdf. The States do not compensate retailers for the costs of implementation, testing, employee training, maintenance, and operation of the software, not to mention audits. The complexity of the U.S. sales tax system that led to the adoption of the physical presence standard

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[9] South Dakota contributes to the complexity with over 100 city, county, and Native American reservation/special district taxes. "Since South Dakota sales tax has numerous local taxing levels that must be monitored and maintained on a regular basis, compliance is complex and time consuming." Avalara TaxRates, *South Dakota Sales Tax Rates*, http://www.taxrates.com/state-rates/south-dakota.

is about much more than the cost of a software license.[10]

The State also points to the purported simplification in state tax systems promoted through the Streamlined Sales and Use Tax Agreement ("SSUTA"). Pet. at 30-31. The SSUTA's alleged simplification measures, however, have attracted the membership of only 24 states, representing less than one-third of the nation's population. Streamlined Sales Tax Governing Board, Inc., *About Us*, http://www.streamlinedsalestax.org/index.php?page=About-Us. The SSUTA has not added new members in several years and the group of non-members includes the six largest states, California, Texas, New York, Florida, Illinois, and Pennsylvania.

2. Market Data Indicates That State Estimates Of Uncollected Use Tax Are Grossly Inflated And That Remote Sales Tax Collection Is Increasing.

The State claims that South Dakota fails to collect $50 million annually on remote sales, and that the national total for uncollected tax is in excess of $20 billion. Pet. at 13-14. The exaggerated claims of the State

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[10] The State points to the decision of Systemax, Inc., to register for sales tax collection as proof that tax compliance is simple. Pet. at 30. The State issued its demand that Systemax register (under threat of litigation) over a month before the State filed suit. In response to a similar demand by the State of Wyoming, Systemax required three months to implement tax collection. There is no evidence concerning what Systemax did to undertake compliance in response to South Dakota's demand.

and its amici ultimately derive from a single source: a study done in 2009 by professors at the University of Tennessee ("Tennessee Study"). *See* Pet. at 12. The Tennessee Study, however, has proven entirely unreliable.

To begin with, the Tennessee Study's inflated estimates were debunked almost immediately by competing analyses. *E.g.*, Jeffrey A. Eisenach and Robert E. Litan, *Uncollected Sales Tax on Electronic Commerce: A Reality Check* (Feb. 2010), https://netchoice.org/wp-content/uploads/eisenach-litan-e-commerce-taxes.pdf (demonstrating that the Tennessee Study overstated the uncollected use tax on Internet sales by approximately three-hundred percent). In addition, Professor Fox recently admitted, during a deposition in another proceeding, that the Tennessee Study was paid for by groups committed to overturning *Quill*. *See Newegg Inc. v. Ala. Dep't of Revenue*, Ala. Tax Tribunal No. S 16-613, Appellants' Motion to Exclude Expert Report and Testimony of William F. Fox (Nov. 8, 2017), at 12 (the 2009 Tennessee Study was funded by the Governing Board of the SSUTA and an unpublished, 2012 update was paid for by the Retail Industry Leaders Association).

The Tennessee Study is also based on taxability data gathered exclusively from state revenue officials. *Id.* at 12-13. This single, biased, data source on taxability was woefully incomplete. Officials from only 29 states participated. *Id.* at 13. The Tennessee Study

simply extrapolated from this group to the states that did not participate. *Id.*[11]

The Tennessee Study is also wildly out-of-date. There have been dramatic changes in the online marketplace with regard to sales tax collection since the Tennessee Study was conducted. Most notably, Amazon.com collected sales tax in only five states (Kansas, Kentucky, New York, North Dakota, and Washington) when the Tennessee Study was published in 2009, but now collects sales tax in every state that imposes a sales tax, including South Dakota. Chris Isadore, *Amazon to start collecting state sales taxes everywhere*, CNN (Mar. 29, 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

Online retail is now dominated by larger retailers that collect sales tax. Along with Amazon, the large "multi-channel" retailers that collect state and local sales taxes (*i.e.*, store-based retailers that also sell online) control the great majority of the Internet marketplace. *See* Brief of National Retail Federation as *Amicus Curiae* in Support of Petitioner ("NRF Brief")

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[11] The Tennessee Study is lacking in other respects. While emphasizing the overall growth of ecommerce as a motivating concern, Professor Fox acknowledged under oath that the figures used for total ecommerce include the "vast number" of non-consumer, business-to-business ("B2B") transactions that make-up the majority of electronic commerce (91.9 percent of ecommerce in 2012 was B2B). *Id.* at 11. The Tennessee Study, however, "did not have any specific data on the B2B companies and their tax behavior." *Id.* B2B transactions are frequently non-taxable sales-for-resale, and most businesses file required use tax returns and are subject to audit.

at 23 (Amazon will soon comprise 50 percent of the online market); *see* Arthur Zaczkiewicz, *Amazon, Wal-Mart, and Apple Top List of Biggest E-commerce Retailers*, WWD (Apr. 7, 2017), http://wwd.com/business-news/business-features/amazon-wal-mart-apple-biggest-e-commerce-retailers-10862796/. Nineteen of the top twenty Internet retailers, including Amazon, already widely collect sales tax. *See id.* Moreover, Amazon alone accounts for sixty percent of all online sales growth. Tonya Garcia, *Amazon accounted for 60% of US online sales growth in 2015*, MarketWatch (May 3, 2016), http://www.marketwatch.com/story/amazon-accounted-for-60-of-online-sales-growth-in-2015-2016-05-03. The perceived problem of uncollected use tax is self-correcting, not worsening.

3. The State's Economic Policy Arguments Are Refuted By Other Sources.

The State insists that the *Quill* rule gives remote sellers an unfair price advantage, driving sales away from in-state sellers. A comprehensive study conducted in 2016, however, showed that convenience was a far greater reason why consumers chose to shop online. PwC, *The race for relevance, Total Retail 2016: United States* (Feb. 2016) at 10. Moreover, remote sellers have always operated at a fundamental cost *disadvantage* to local businesses, because remote sellers must charge (or absorb) shipping and handling fees in order to deliver their products to consumers. Such fees are almost invariably greater, as a percentage of the purchase price, than the sales tax. *See* Janet Stilson, *Study*

Shows Prevalence 'Webrooming,' Adweek (May 14, 2014) (47 percent of consumers say avoiding shipping costs is the primary reason they go to a store to buy a product after researching it online), http://www.adweek.com/brand-marketing/study-shows-prevalence-consumer-webrooming-157576/.

The State insists that the physical presence rule promotes economic inefficiency, but it fails to understand the most basic facts. The State paints a picture of concurrent "wasteful" transactions in which a California consumer purchases a product from Wayfair in Massachusetts, and a Massachusetts consumer purchases the same product from Newegg in California. Pet. at 19. According to the State, "[b]oth buyers get 'free shipping' and 'no tax' on the same items as they cross paths on pointless cross-country excursions." *Id.* This might be compelling, if it were not completely wrong. Wayfair has warehouse facilities in California, and collects sales tax in the state; Newegg has warehouse facilities in New Jersey (and collects sales tax there) from which it serves customers on the east coast. A California customer might order from Wayfair, and a Massachusetts customer might order from Newegg, but their purchases will not "wastefully" crisscross the United States and the *Quill* rule will have no bearing whatsoever on the economic efficiency of their purchases.

Several of the State's amici decry the practice of "showrooming," in which a customer goes to a local store to learn about a product, only to then purchase the product online free of sales tax. *See, e.g.*, NRF Brief

at 10. According to the State, such practices not only show the unfairness of the *Quill* rule, but also result in retailers refusing to invest in customer service, harming the U.S. economy as a whole. *See* Pet. at 19. The State's misunderstanding of the modern marketplace is profound. Recent studies prove that instances of "showrooming" are dwarfed by precisely the opposite phenomenon ("webrooming") in which consumers use a website to research a product (including detailed specifications and customer reviews) and then go to a local store to purchase it. MEC Global, *Spotlight on Webrooming* (May 2016) at 4 (consumers five times more likely to engage in webrooming than showrooming), http://www.mecglobal.com/assets/publications/2016-05/Spotlight-On-Webrooming.pdf.

The effect of this trend is dramatic. Forester research estimated that by 2017, the volume of in-store retail purchases attributable to "webrooming" would be nearly five times the volume of *all* consumer electronic commerce. *See* Stilson, *supra* (citing Forester study). Furthermore, consumers prefer retailers who offer the opportunity to see a product in person before they buy, increasing the pressure for retailers to offer a multi-channel shopping experience, *i.e.*, both a store location and website. Sara Spivey, *Consumers have spoken: 2016 is the year of "webrooming,"* Marketing Land (July 29, 2016), http://marketingland.com/consumers-spoken-2016-year-webrooming-180125. Contrary to the State's unfounded concerns about "free riding" and declining customer service in retail stores, consumers expect retailers to provide enhanced services during

their store visits following Internet research. *Id.* These market pressures not only enhance customer experience, they necessarily result in greater sales tax collection – whether in-store, or online – by multi-channel retailers that increasingly dominate the retail marketplace.

IV. The Petition Ignores The Issue Of Retroactive Liability.

The fundamental rule of "retrospective operation" has "governed 'judicial decisions . . . for near a thousand years.'" *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94 (1993) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). "Unlike a legislature, we do not promulgate new rules to be applied prospectively only." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring) (internal quotation omitted).

It is well-established that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements of res judicata." *James B. Beam*, 501 U.S. at 544; *Harper*, 509 U.S. at 90. The State's complaint demands a declaration that the Act applies to respondents. *See* Complaint, Prayer for Relief, ¶ 1. A ruling concerning *Quill* that does *not* apply to the respondents would plainly be advisory.

It is a uniform principle of state and local sales tax law that a seller who is properly charged with the obligation to collect use tax from purchasers in a state

but fails to do so becomes liable for the uncollected tax. *E.g.*, Cal. Rev. & Tax. Code § 6204; N.Y. Tax Law § 1133(a). A ruling by the Court that the *Quill* rule is invalid will expose all remote sellers that have relied on the rule to retroactive liability in dozens, if not hundreds, or even thousands of jurisdictions.

South Dakota's choice to forego its remedy for back taxes in the event that the Court were to overrule *Quill* will not limit the retroactive application of such a ruling with respect to other state and local jurisdictions. The issue of remedy is determined with reference to state law. *James B. Beam*, 501 U.S. at 535; *see also Harper*, 509 U.S. at 102 (a state is "free to choose which form of relief it will provide"). While South Dakota has elected to forego its potential recovery of past due use taxes from remote sellers, SDCL §§ 10-64-6, -7, its election cannot bind other states (or localities), which are free to determine their own remedial approach if the physical presence rule is overturned. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring) (the Court's determination of constitutionality applies to similar statutes in other States "whether occurring before or after our decision"). It is significant that the amicus brief of the States does not disavow back tax liability if *Quill* is reversed. The Connecticut Department of Revenue Services ("DRS") has already begun notifying retailers without a physical presence in the state that it intends to pursue them for three years of back tax liability, on the theory that the physical presence rule no longer prevents the state from compelling use tax collection by out-of-state

sellers. *See* Connecticut DRS Media Release, *Connecticut Pursues Sales Taxes Not Paid by On-line Retailers* (Mar. 28, 2017), http://www.ct.gov/drs/cwp/view.asp?Q=591496&A=1436.

Of course, Congress, unlike the Court, can implement a legislative solution with prospective effect. *Harper*, 509 U.S. at 107 (Scalia, J., concurring) ("that which distinguishes a judicial from a legislative act is, that the one is a determination of what existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.") (quoting T. Cooley, Constitutional Limitations at 91).

V. Developments In Other States Further Counsel Denial Of The Petition.

A. The States Have Tools To Increase Consumer Use Tax Collection.

The central criticism of the *Quill* rule is that it prevents States from requiring collection by retailers of use taxes that the States cannot effectively collect from in-state consumers. *See Brohl I*, 135 S.Ct. at 1127 (noting that use tax compliance by purchasers is "relatively low"). States, however, now have at their disposal legislative options for effectively securing use tax compliance by in-state residents.

After remand in *Brohl I*, the Tenth Circuit Court of Appeals upheld Colorado's notice and reporting law. *Direct Mktg. Ass'n v. Brohl*, 813 F.3d 1129 (10th Cir.)

("*Brohl II*"), *cert. denied*, 137 S.Ct. 591 (2016). The Tenth Circuit held that requiring retailers with no physical presence in a state to notify in-state customers of their use tax obligations and to provide detailed information to the state revenue department regarding their customers' purchases did not violate the Commerce Clause. *Id.* at 1147. As a result, notice and reporting laws have given the states "new tools for improving consumer-based use tax compliance." Adam Thimmesch, David Gamage, and Darien Shanske, *Consumer-Based Use Tax Enforcement And Taxpayer Compliance*, 86 State Tax Notes 319 (Oct. 23, 2017).

In response to *Brohl II*, a number of states, including Louisiana, Pennsylvania, Rhode Island, Vermont, and Washington have already followed Colorado's lead in adopting such laws. La. Rev. Stat. § 47:309.1 (2017); Pa. Gen. Assembly, H.B. 542, § 213.2 (2017-2018); R.I. Gen. Laws § 44-18.2-3(E) (2017); Vt. Stat. Ann., tit. 32, § 9712 (2017); Wash. Rev. Code § 82.13.020 (2017). Colorado expects to secure 60 percent of unremitted use tax through its notice and reporting law alone. Brief for Colorado and 34 Other States and the District of Columbia as Amici Curiae Supporting Petitioner, at 8.

B. *Quill* Challenges In Other States Are Focused On Developments Concerning Electronic Commerce.

Contrary to the State's contention, litigation concerning "anti-*Quill*" laws is not rampant in other states, nor are remote sellers vulnerable to countless

assessments for failing to report use taxes in response to such laws. Pet. at 36. Retailers are able to rebut the presumption of nexus under "click through nexus laws" with simple administrative measures, no litigation has been initiated in response to state notice and reporting laws after *Brohl II*, and "economic nexus" statutes akin to the Act have been largely suspended in response to court challenges. *E.g.*, *Ind. Dep't of Revenue v. Wayfair Inc.*, Ind. Sup. Ct., Marion Cnty. No. 49D01-1706-PL-025946; *Am. Catalog Mailers Ass'n v. Tenn. Dep't of Revenue*, Tenn. Chan. Ct., Davison Cnty. No. 17-307-IV ("Tenn. Action"). There is not a crisis in the lower courts requiring precipitous action.

There are, however, a handful of pending suits in which the issue of use tax compliance in the Internet era is likely to be developed. In Tennessee, the Department of Revenue has pursued discovery in order to defend its new "economic nexus" regulation in response to a *Quill* challenge. *See* Tenn. Action, Memorandum in Support of Motion to Compel (June 30, 2017). In Massachusetts, the Department of Revenue supported with regulatory findings and a public comment process its regulation requiring sales tax reporting by Internet sellers. *See* 830 CMR 64H.1.7. A challenge to the Massachusetts rule is underway in Virginia circuit court. *See Crutchfield Corp. v. Harding*, Vir. Cir. Ct., Albemarle Cnty. No. CL17001145-00. In Alabama, the parties have served competing expert reports and conducted expert depositions in connection with the Department's effort to enforce its avowed "anti-*Quill*" rule against Newegg. *See* Ala. Tax Tribunal No.

S 16-613. These cases present opportunities for a properly developed record to address the continuing vitality of *Quill* in the Internet era, in sharp contrast to this appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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